No. 238.

(Brief of Todd for P. E.

Filed Dec. 13, 1897.

United States Supreme Court

OCTOBER TERM, 1897.

EVERETT JOLLY, Plaintiff in Error,

vs. No. 238.

UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

ROBERT S. TODD,
Attorney for Plaintiff in Error.

HOWARD PRINTING CO., OWENSBORO, KY.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

EVERETT JOLLY, PLAINTIFF IN ERROR.

vs. No. 238.

THE UNITED STATES.

Brief and Argument For Plaintiff in Error.

At the June term, 1895, of the District Court of the United States, for the District of Kentucky, at Owensborough, an indictment was returned against the plaintiff in error, containing five counts.

The plaintiff in error filed a demurrer to each count of the indictment, and the demurrer was sustained to the third and fourth counts. But the demurrer to the first, second and fifth counts was overuled, to which the plaintiff in error excepted. (Record, pp. 4 and 5.)

The plaintiff in error was found guilty as charged in the first and second counts, but the jury said nothing in their verdict as to the fifth count. (Record, p. 7.)

The counts under which the plaintiff in error was found guilty are as follows, to-wit :

"First count. The grand jurors of the United States of America, impanneled and sworn and charged to inquire in and

for the district of Kentucky, on their oath present that Everett Jolly, late of the district aforesaid, on the 25th day of April, in the year of our Lord eighteen hundred and ninety-four, in the district aforesaid, in the county of Breckenridge, State of Kentucky, and district aforesaid, did then and there feloniously steal, take and carry away from a building then and there used as a postoffice building of the United States of America, at Hardinsburg, in the county, State and district aforesaid, postage stamps of the United States of America amounting to one hundred and sixty-three and 12-100 dollars, said stamps being of the denomination—2,683 one cent, 2,400 two-cent, 191 four-cent, 183 five-cent, and 670 ten-cent stamps, 100 one-cent postage due stamps, and 175 two-cent postage-due stamps, but a more particular description of said stamps is to the grand jurors unknown, but that they were then and there of the value of one hundred and sixty-three and 12-100 dollars, lawful money of the United States of America, and were then and there the personal property of the United States of America, against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. Sec. 5456."

"Second count. And the grand jurors aforesaid upon their oaths aforesaid do further present that Everett Jolly, late of the district aforesaid, on the twenty-fifth day of April, in the year of our Lord eighteen hundred and ninety-four, in the district aforesaid, in the county of Breckenridge, State of Kentucky and district aforesaid, did then and there feloniously steal, take and carry away postage stamps of the United States of America amounting to and of the value of one hundred and sixty-three and 12-100 dollars, lawful money of the United States of America, being of the denomination of 2,683 one-cent, 2,400 two-cent, 191 four cent, 183 five-cent and 670 ten-cent stamps, 100 one-cent postage-due stamps, 175 two-cent postage-due stamps, but a more particular description of said stamps is to the grand jurors unknown; said stamps were then and there feloniously stolen, taken and carried away by the said Everett Jolly from the possession of Thomas McClure, who was then and there a postmaster of the United States of America of the postoffice at Hardinsburg, in Breckenridge county, State of Kentucky and

district aforesaid, and as such postmaster then and there had said stamps in his possession when so taken, and the said stamps so stolen, taken and carried away being then and there the personal property of the United States of America against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided. Sec. 5456."

At the conclusion of the evidence, the plaintiff in error moved the court to instruct the jury to find the defendant not guilty as charged in first, second and fifth counts. The motion was overuled, to which the defendant excepted. (Record, p. 7.)

The plaintiff in error, before the rendition of judgment on the verdict, made a motion in arrest of judgment, but the court overruled the motion and refused to arrest the judgment, to which the plaintiff in error excepted. (Record, pp. 7 and 69.)

The plaintiff in error assigned the following as errors:

1. It was error for the court to overrule the demurrers filed by the defendant to counts Nos. 1, 2 and 5 in the indictment herein.

2. It was error to allow the Government to prove by the witness, W. J. Vickery, what purported to be a confession to said Vickery, made to him by the defendant.

3. It was error to permit the district attorney to read as evidence to the jury letters or any part of letters or postal cards or any writings whatever purporting to have been written or received by the defendant.

4. It was error for the court to overrule the motion made to the court by the defendant to instruct the jury to find the defendant not guilty on counts Nos. 1, 2, and 5 of the indictment.

5. It was error for the court to charge the jury as follows:

"Gentlemen of the Jury: You had better, perhaps, read these counts, so that you may have in your minds the exact charge."

The second count is substantially the same as the first, except as to a slight difference as to the person. Now, the two counts, first and second, allege in terms that he himself feloniously did steal, take, and carry away these stamps. The particular amount is not necessary for the government to prove, or the particular value of the stamps; but it is necessary for you to believe from the evidence, beyond a reasonable doubt, that he himself has stolen these stamps; that he has stolen them as alleged here; that they were the personal property of the United States, and were stolen and carried away from the building used as a postoffice building of the United States at Hardinsburg.

"Under the second count you must believe that he has stolen these stamps thus stolen or some of them; that they were the personal property of the United States, and that they were then in the personal possession of Thos. McClure, who was the postmaster at the time—that is, that they were in his possession as postmaster of the United States."

6. It was error for the court to charge the jury as follows:

"Therefore, in considering the case (you have heard it all)—you conclude that the accused is guilty of the offense charged in the first and second count—or either of them or both of them, to the exclusion of a reasonable doubt, you should so find; if not, not. So with the fifth count. But you should not find him guilty of the first and second and the fifth or of the first or second and fifth count if you find him guilty, and you may find him guilty if you think the evidence justifies. You may find him guilty of both the first and second, but you must not find him guilty of the first and second or of the first and second and fifth count, because in the evidence here one crime is inconsistent with the other."

7. The court erred in charging the jury as follows:

"Now, gentlemen, take the case; consider it calmly, impartially, and say whether or not the Government has made out

any of these charges. You should not, and I am sure you will not, be swayed in your judgment or influenced in the slightest degree by any interest or sympathy either for the accused or for his family. All men on trial have the presumption of law of innocence which I have just indicated to you, and all men stand equally before the law. If, after a fair, careful, and impartial consideration of the evidence, you conclude there is a reasonable doubt of this man's guilt, you find him 'not guilty.' If, on the contrary, you should find him guilty to the exclusion of a reasonable doubt, you should say so without regard to his interest, without regard to him, without regard to his family."

8. The court erred in not instructing the jury, on the motion of the defendant, that if they believe from the evidence that the defendant took the stamps from Louis McClure upon the streets of Hardinsburg, away from the postoffice building, then he should be acquitted under the indictment.

9. The court erred in refusing to instruct the jury on motion of the defendant, that before they could convict the defendant under the second count of the indictment they must believe that the defendant took the stamps from the actual corporal possession of Thomas McClure.

12. The court erred in overruling the motion of the defendant to arrest the judgment herein.

The first and second counts of the indictment are framed under the provisions of section 5456, of the United States Revised Statues, which is as follows:

"Every person who robs another of any kind or description of personal property belonging to the United States, or feloniously takes and carries away the same, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one nor more than ten years, or by both such fine and imprisonment."

The offense committed by the defendant, according to the evidence before the jury, was the taking and carrying away from the postoffice at Hardinsburg, of certain postage stamps belonging to the United States.

Argument.

Our contention is that no indictment can be based on the provisions of section 5456, U. S. Revised Statutes, for the offense of taking and carrying away postage stamps belonging to the United States. That Congress has provided for the punishment of that offense by another section of the statutes, namely, section 5453, and that this is the only statute that applies to such offense. That postage stamps are not personal property of the United States, or things of value, but are merely representatives of value, and have been so declared by Congress by section 5413, U. S. Revised Statutes.

If we are right in this contention, the demurrers to the first and second counts (and the fifth count also) should have been sustained, or the court should have sustained the motions for a peremptory instruction to find for plaintiff in error or the motion in arrest of judgment.

The statute (sec. 5456) declares that every person who *robs* another of any kind or description of *personal property* belonging to the United States, or feloniously takes and carries away the same, shall be punished by fine and imprisonment.

Robbery is a common law offense and resort must be had to the common law for a definition of the offense. (In Re. Greene, 52 Fed. Reptr. 111, Jackson, Judge; U. S. vs. Armstrong 2 Curt. 446; U. S. vs. Coppersmith, 4 Fed. Reptr. 198).

It is defined as "the felonious and forcible taking away from the person of another of goods or money to any value, by violence and putting him in fear." 4 Black Com. 342; 2 East.

P. C. 707; Roscoe's Cr. Ev. 931; 2 Wharton's Cr. Law, Sec. 1695; U. S. vs. Reeves, 38 Fed. Reptr. 405, 406; U. S. vs. Wilson, Balwin 78.

And the words "feloniously takes and carries away the same" must (noscitur a sociis) be the felonious and forcible taking of personal property, belonging to the United States, from the person of another. (United States vs. Jones, 3 Wash. 216; Desty's Am. Cr. Law, sec. 142, a.). The property must be the subject of larceny. (Rex. vs. Cannon, Russ. & R. C. C. 146; Reg. vs. Hemming, 4 Fost. & F. 50).

The crime of robbery includes larceny as robbery is larceny committed by violence from the person of one put in fear.

In the criminal law the words personal property or personal goods or chattels, or words of like import, have never been held to include choses in action, such as notes, bonds, receipts, etc., or other representatives of value.

In United States vs. Davis, 5 Mason, 356-365, the defendant was indicted for stealing certain bank bills, a promissory note, etc., and one of the questions considered was whether under the Crimes Act of 1790, sec. 16, (1 U. S. Stat. Large, 112.) the words "personal goods" embraced choses in action.

Mr. Justice Story in the opinion says:

"Further, an indictment on the act of 1790 lies only where the offense is committed in respect to the personal goods of another. To ascertain what is the meaning of these words we must resort to the common law, for that furnishes the proper rule of interpretation. Now, in the strict sense of the common law, personal goods are goods which are movable, belonging to, or the property of, some person, and which have an intrinsic value. Bonds, bills and notes, which are choses in action, are not esteemed, by the common law, goods whereof larceny may be committed, being of no intrinsic value, and not importing any property in possession of the person from whom they are

stolen, but only evidence of property. See 2 Bl. Com. 383, 387, 394, 396, 397 ; 4 Bl. Com., 232-234 ; 2 East, Pl. Cr., 587 ; 2 Russell, Crimes, 1095 ; 1 Hawk. P. Cr.. B. 1, ch. 33, secs. 34, 35. It is true that the words, 'goods' or 'chattels,' may, in the construction of wills, include bonds, notes, bank bills, etc.; but this is upon the presumed intention of the testator, where a liberal exposition of his words is allowable, and upon principles derived from the civil and canon law. 2 Roper on Legacies, ch. 16. But in penal statutes a more strict construction is adopted ; and the analogy of the common law in respect to larceny may well furnish the proper rule for decision. We think, then, that 'personal goods,' in the sense of the act of 1790, do not embrace choses in action, And the present indictment is, in part, founded on a larceny of choses in action."

See also :

People vs. Cook, 2 Parker Cr. R. 12 ;
Greeson vs. State, 5 Howard, (Miss.) 33 ;
State vs. Cassados, 1 Nott & McC. 91 ;
Payne vs. People, 6 Johnson 103 ;
Colye's Case, 8 Coke 33 ;
Rex vs. Morris, 1 Leach 468 ;
1 Hawkins' Pleas Cr. Ch. 32, Sec. 35 ;
2 Bishop's Crim. Law (6 Ed.) Secs. 782-787 ;
People vs. Loomis, 4 Denio 380 ;
Culp vs. State, 1 Port. (Ala.) 33 ;
Reg. vs. Watts, 24 Eng. L. & E. 573 ;
People vs. Bradley, 4 Park Cr. C. 245 ;
People vs. Griffin, 38 How. Pr. 475 ;
State vs. Hill, 1 Houst. Crim. C. (Del.) 420 ;
Bishop on St. Crimes, Sec. 344.

A postage stamp is a representative of value. It is an obligation of the United States.

It is a receipt or obligation of the Government, which, when passes into the hands of a person, is evidence that he has

paid the tax or compensation the Government charges for transporting mail. Being a receipt or representative of value, in the hands of the United States, it is not a subject of larceny at the common law, and can be so only when it is so provided by by statute.

Section 5413 of the U. S. R. S., is as follows:

"The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national (bank) currency, coupons, United States notes, Treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representations of value, of whatever denomination, which have been or may (be) issued under any act of Congress."

The statute plainly declares that the words "obligations of the United States," includes "stamps" and that they are "*representatives* of value."

And in sections 5467 and 5469 of the U. S. Rev. Stats., postage stamps are designated as obligations and securities of the government.

The laws of the United States do not, and it is supposed could not, provide a punishment for a larceny of postage stamps belonging to a person and not the property of the United States.

Congress has, as we believe and contend, expressly provided a punishment for a larceny, or taking and carrying away, of postage stamps, from a post office of the United States, or from any other place where they are kept or deposited by authority of the United States. And it is the only statute that does so provide and consequently the only law under the provisions of which an indictment can be found for that offense.

That statute is as follows:

"Sec. 5453. Every person who, without authority from the United States, secrets within, embezzles or takes and carries away from, any building, room, office, apartment, vault, safe, or other place where the same is kept, used, employed, placed, lodged, or deposited by authority of the United States, any bed piece, bed-plate, roll, plate, die, seal, type, or other tool, implement, or thing used or fitted to be used in stamping or printing, or in making some other tool or implement used or fitted to be used in stamping or printing, any kind or description of bond, bill, note, certificate, coupon, postage stamp, revenue stamp, fractional-currency note, or other paper instrument, obligation, device, or document, now or hereafter authorized by law to be printed, stamped, sealed, prepared, issued, uttered, or put in circulation on behalf of the United States, or who, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material prepared and intended to be used in the making of any such papers, instruments, obligations, devices, or documents, or who, without such authority, so secretes, embezzles, or takes and carries away any paper, parchment, or other material printed or stamped, in whole or part, and intended to be prepared, issued, or put in circulation on behalf of the United States as one of the papers, instruments, or obligations hereinbefore named, or printed or stamped, in whole or part, in the similitude of any such paper, instrument, or obligation, whether intended to issue or put the same in circulation or not, shall be punished by imprisonment, at hard labor, not more than ten years, or by a fine of not more than five thousand dollars, or both."

This section creates a statutory offense. It would not be necessary in an indictment under this section, for "embezzleing" or "taking and carrying away," any of things mentioned, to allege that they were property of the United States.

If the indictment had charged that the plaintiff in error, at &c., on &c., "did, then and there, without authority from the

United States, take and carry away from an office, to-wit, an office then and there used and occupied as a post-office of the United States at Hardinsburg, in said county and district, where the same were kept by authority of the United States, certain obligations of the United States, towit: postage stamps of the United States, (describing them) which said postage stamps had been, and were then and there, wholly printed and stamped by the United States, and were intended to be issued and put in circulation on behalf of the United States, as obligations of the United States, against the peace and dignity of the United States and contrary to the form of the statute in such cases made and provided," it would have been good under section 5453.

But neither the first or second counts of the indictment under which the plaintiff in error was convicted are sufficient under the provisions of section 5453, because it is not alleged, first, that the postage stamps were taken "without authority of the United States;" second, that the postage stamps were "kept" or "deposited" in the post-office at Hardinsburg "by authority of the United States;" third, that the postage stamps were wholly "printed" or "stamped" by the United States; fourth, that the postage stamps alleged to have been taken were intended to be "issued or put in circulation on behalf of the United States as instruments or obligations of the Unite States;" and fifth, that the postage stamps were "obligations" of the United States.

It would be necessary, we respectfully submit, in framing an indictment under that section to allege each of the foregoing facts.

Offenses created by statute as well as offenses at the common law, usually consist of many ingredients, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the

indictment will be bad on demurrer, or it may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. United States vs. Cook, 17 Wallace 174; United States vs. Reese, 92 U. S. 225; United States vs. Hess, 124 U. S. 486.

The rule adopted by this court in the construction of criminal and penal statutes passed by Congress is, that they are to be construed strictly, not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used.

In United States vs. Wiltberger, 5 Wheaton 95-96, Chief Justice Marshall uses the following language:

"The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

"It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning

of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

There was some contention in the court below, that although that statute (Sec. 5456) might not embrace the stealing of postage stamps, that the indictment was good under section one, chapter 144, 18 St. L. 479, 2nd Supp. R. S. p. 88. If our contention above made, is sound we submit that it applies with equal force to the section just referred to. To be convicted under that statute, one must be guilty of the larceny or embezzlement of money, property, record, voucher, or some valuable thing of the moneys, goods, chattels, records or property of the United States. A postage stamp is none of these. We take it that the words "or valuable thing whatever of the moneys, goods, chattels, records or property of the United States," are all limited to the meaning of the words given before, namely, "money, property, record, or voucher." But independent of that rule of construction, the words chattels or goods, when used in a penal statute, do not include choses in action, such as receipts or promissory notes, and therefore the indictment is not good under that statute.

We therefore respectfully submit to the court, that the court below erred in not sustaining the demurrer to the first, second and fifth counts; that it was also error to overrule the mo-

tion by plaintiff in error, to instruct the jury to find him not guilty on each of those counts and erred in not arresting the judgment. These rulings of the court are specifically assigned as errors.

As to the fifth count of the indictment, the verdict of the jury being silent as to it, was equivalent to a verdict of not guilty on that count. "A verdict of guilty on one count, saying nothing as to other counts, is equivalent to a verdict of not guilty as to such other counts, * * *." Wharton's Cr. Pldg. & Pract. sec. 740 and cases cited in the note, and Rapalje's Cr. Pro. sec. 134.

We respectfully pray a reversal.

ROBERT S. TODD,
Attorney for Plaintiff in Error.

AUTHORITY CITED.

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2 Supp. U. S. R. S. p. 88, Ch. 144 Sec. 1.

In Re. Greene, 52 Fed. Rep. 111;

U. S. vs. Armstrong, 2 Curt. 446;

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4 Blackstone's Com. 242;

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